Supreme Court, U.S.
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87-27

No.

In the Supreme Court of the United States

October Term, 1986

LEONARD THIER,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Was the Petitioner denied his Sixth Amendment right to assistance of counsel by the failure of the Trial Court to appoint stand-by counsel to assist him in his defense?

2. Was the application of the Pennsylvania Fireworks Law, 35 Pa. C.S.A. 1271 *et seq*. to the fireworks involved in this case unconstitutional in that said fireworks are legal under federal laws which have preempted all state regulation in this field?

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IN THE SUPREME COURT OF THE
UNITED STATES
LEONARD THIER,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Leonard Thier respectfully presents this petition for allowance of certiorari to the Supreme Court of Pennsylvania.

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS DELIVERED IN THE COURTS OF COMMON PLEAS

There are no official or unofficial reports of the opinions delivered by the Court of Common Pleas of Luzerne County.

STATEMENT OF JURISDICTION

The Superior Court of Pennsylvania affirmed Petitioner's conviction on June 16, 1986. The Supreme Court of Pennsylvania denied his Petition for Allowance of Appeal on April 21, 1987. Jurisdiction is conferred upon the Supreme Court of the United States by 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U.S. Constitution, Article VI:

> This Constitution . . . Shall be the Supreme Law of the Land.

U.S. Constitution, Amendment 6:

> In all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

15 U.S.C. 1261 notes, 86 Stat. 613 # 18:

> No state or political subdivision of a state may establish or continue in effect a requirement applicable to such substance and designed to protect against the same risk of illness of injury unless such requirement is identical to the requirement established under such regulations.

15 U.S.C. 1261(q)(1):

> The term 'banned hazardous substance' means (a) any toy or other article intended for use by children which is a hazardous substance.
>
> Provided that the Secretary, by regulation shall exempt from clause (A) . . . common fireworks.

16 C.F.R. §1507:

> See Appendix F, p. 23a.

STATEMENT OF THE CASE

On September 19, 1984, the Petitioner, Leonard Thier, was found guilty of five counts of offering fireworks for sale in violation of the Pennsylvania Fireworks Act, 35 Pa. C.S.A. 1272.

The specific fireworks involved were air travels (bottle rockets), toy tanks, artificial satellites and ground bloom flowers. Appendix D, p. 16a.

Post-trial Motions were denied and Petitioner was sentenced to (60) sixty days in prison and fined $500.00. Appendix A, p. 1 a.

Petitioner's claim that he was denied his sixth amendment right to counsel was raised in Post-Trial Motions. Appendix E, p. 20a.

In ruling on the Motions the Trial Court held (1) that Petitioner waived his right to counsel, and (2) that Petitioner was not indigent and could afford to hire counsel. Appendix A, p. 1a. The Superior Court affirmed the Trial Court on this issue. Appendix B, p. 10a.

Petitioner's claim that the Pennsylvania Fireworks Law was unconstitutionally applied to him is based on the proposition that the fireworks involved are Class C fireworks, the possession of which is lawful under federal law. 16 C.F.R. 1507. Petitioner was prevented from establishing an evidentiary basis for this argument by the Trial Court. Appendix D, p. 16a. The issue was raised in Post-Trial Motions, Appendix E, p. 20a, but not considered by either the Trial Court in ruling on the Motions or by the Superior Court on appeal. Both courts considered the issue waived. Appendices A & B, pp. 1a & 10a.

REASONS FOR THE ALLOWANCE OF THE WRIT

Right to Counsel

The Sixth Amendment to the United States Constitution requires that no accused can be convicted and imprisoned without being offered the right to counsel. *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed. 2d 530 (1972). The reason for this provision is that the help of a lawyer is essential to assure an accused a fair trial. *Powell v. Alabania*, 287 U.S. 45.69, 53 S.Ct. 55, 77 L.Ed. 158 (1956).

Petitioner waived his right to counsel in an on the record colloquy before the Trial Judge. The Trial Judge did not, however, provide the Petitioner with stand-by counsel to assist in his defense.

A requirement that stand-by counsel be appointed when the right to counsel is waived in a case involving imprisonment would improve the administration of justice by insuring fair trials. It cannot be denied that laymen clearly lack the knowledge and skill to adequately prepare and present a defense in a criminal imprisonment case without professional assistance. Competent stand-by counsel can clearly provide such assistance and thereby increase the insurance of a fair trial.

Moreover, the presence of stand-by counsel does not limit the right to self-representation promulgated in *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed. 2d (1975). Indeed, stand-by counsel does not con-

trol the case and is only available to offer assistance to the accused when it is requested.

Petitioner submits therefore that the Writ should be granted and the Court should consider whether or not the Sixth Amendment should be interpreted to require stand-by counsel when an accused, faced with imprisonment, asserts his right to self-representation.

Preemption

During the trial of this matter Petitioner attempted to prove that the fireworks in question in this case were Class C fireworks that are legal under federal law. This opportunity was denied him by the Trial Court. Appendix D, p. 16a. Had Petitioner been able to introduce such proof he would have established an evidentiary basis for his argument that federal law preempts the field as to Class C fireworks and that, therefore, a state statute making it a crime to offer these for sale is unconstitutional.

In *Jones v. Rath Parkway,* 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed. 2d 604 (1977), the Supreme Court set forth two tests to determine whether a challenged state statute is void under the Supremacy Clause of the U.S. Constitution. The first test is whether Congress has prohibited state regulation in a particular area. Such a prohibition can be explicitly stated in the statute's language or implicitly found on its purpose. In either case state laws regulating that aspect of commerce are prohibited *Jones v. Rath Parkway,* 430 U.S. at 525-29. The second test is whether the state legislation conflicts with Congressional enactment. In such a case, the state law must fail if, as

written or applied, it "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress." *Jones v. Rath Parkway,* supra, citing *Hines v. Davielowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941).

The Federal Hazardous Substance Act, 15 U.S.C. 1261 et seq. specifically provides that common fireworks shall not be considered banned hazardous substances which are prohibited by Act 15 U.S.C. 1261(q)(1). The Secretary of Commerce has, by authority granted in the Act, promulgated regulations which provide *inter alia* that the fireworks involved in the action are such common fireworks. 16 C.F.R. 1507.

The Federal Hazardous Substance Act further provides in Section 18(b)(1)(B), 35 U.S.C. 1261 notes, that no state may establish or continue in effect a requirement applicable to such substances unless it is identical to the federal requirements. This clearly evidences a congressional intent to preempt the field.

The offering for sale of the common fireworks involved in this case is legal under federal law, 15 U.S.C. 1261(q)(1); 16 C.F.R. 1507. The state courts have held that the offering of such fireworks for sale constitutes a violation of the Pennsylvania Fireworks Law. Such an interpretation and application of the state law brings it into direct conflict with the Federal Hazardous Substance Act and the provisions therein requiring state regulation of such substances to be identical to federal regulations.

CONCLUSION

Petitioner submits, therefore, that the application of the Pennsylvania Fireworks Law to the facts of this case is unconstitutional by reason of the Supremacy Clause contained in Article VI of the U.S. Constitution and the preemption doctrine. This Federal Constitutional Issue has not previously been decided by the Court. It involves a matter of great importance both to Petitioner and to the fireworks industry. The Court is respectfully requested, therefore, to grant the petition for certiorari.

Respectfully submitted,
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Appendix A

APPENDIX A

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS
v.	:	OF LUZERNE
	:	COUNTY*
	:	CRIMINAL
LEONARD THIER	:	NO. 461, 461A,
	:	B,C,& D of 1984

OPINION

The Defendant, Leonard Thier, was found guilty on five counts of violation of 35 Pa. C.S.A. 1272[1] on September 19, 1984. (Information Nos. 461, 461-A, 461-B, 461-C, 461-D). Following the filing of a post-verdict motion and supporting brief, the Commonwealth submitted a brief in opposition to the Defendant's motion to which the Defendant submitted a responsive brief. The following errors were specifically raised in Defendant's post-trial motion and addressed in the brief:

> 1. The Learned Trial Judge, in his instructions to the jury, made an error in not advising the jury of the adjudication handed down by the Pennsylvania Superior Court in *Commonwealth v. Bristow*, 185 Pa. Super. 448, to the effect that to be illegal in Pennsylvania, a fireworks device must detonate, that is explode with noise, and that omission precluded my right to a fair trial.

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[1] In pertinent part, §1272 reads:
"Except as hereinafter provided, it shall be unlawful for any person, copartnership, association or corporation to offer for sale, expose for sale, sell at retail, or use or explode any fireworks ... ."
1939, May 15, P.L. 134, §2, 35 Pa. C.S.A. 1272.

2. The Learned Trial Judge, in his instructions to the jury, omitted telling the jury that the words 'such fireworks as are not herein prohibited' are indeed contained in the fireworks act (Section 4, paragraph 1). This phrase clearly establishes that the legislature in its wisdom did not intend to outlaw all fireworks and failure of the Learned Trial Judge to instruct the jury on this precluded my ,right to a fair trial.

3. The prosecution never proved that I sold any fireworks, legal or illegal, at any time or place, particularly in Luzerne County, thus precluding jurisdiction in this matter.

4. My rights under Arborsanger [sic] v. Hamlin, Sheriff, U.S. Supreme Court, 407 U.S. 25, June 12, 1972, have been violated by statements and attitudes expressed by Learned Judge thus precluding my right to a fair trial.

Unfortunately, certain issues which were presented and argued in the Defendant's brief cannot now be addressed by us because they were not raised specifically in the post-verdict motion, and have not, therefore, been preserved for review.[2] *Commonwealth v. Goldblum,* 498 Pa. 455, 467, 447 A.2d 234, 240 (1982); *Commonwealth v. Gravely,* 486 Pa. 194, 198-199, 404 A.2d 1296, 1298 (1979); *Com-*

[2] Generally, the arguments addressed in the brief but not in the post-verdict motion, include the following: (1) that the defendant did have standing to contest the admission of certain invoices; (2) that the Defendant's Fifth Amendment rights were violated when he was denied a Grand Jury; (3) that Defendant was denied the right to a speedy trial and to be confronted with the witnesses against him; (4) that the Learned Trial Judge led the Defendant's witness into hearsay and highly speculative testimony and led the witness into making other erroneous and unfair statements; (5) that the Learned Trial Judge prohibited the introduction of Defendant's insurance policies; and (6) that the statute in question was unconstitutionally applied to the Defendant.

monwealth v. Cardona, 316 Pa. Super. 381, 384-386, 463 A.2d 11, 13-14 (1983).[3]

Defendant first argues that the Court erred in failing to instruct the jury that according to *Commonwealth v. Bristow*, 185 Pa. Super. 448, 138 A.2d 156 (1957), in order to fall within the purview of the Pennsylvania Fireworks Law, the fireworks must "detonate", that is, explode or burst with a loud noise.[4] The law is clear that the trial court should instruct the jury on the law applicable to the facts of the case before it and should charge only on those points and issues which arise out of the evidence and arguments presented. *Commonwealth v. Schaller*, 493 Pa. 426, 430, 426 A.2d 1090, 1092 (1981). Accord: *Commonwealth v. Bighum*, 452 Pa. 554, 307 A.2d 255 (1973); *Commonwealth v. Whiting*, 409 Pa. 492, 187 A.2d 563 (1963). Additionally, we note that the sufficiency of instructions depends on whether the law is adequately, accurately, and clearly presented to the jury. *Commonwealth v. Crawford*, 285 Pa. Super. 169, 427 A.2d 166 (1981). We are satisfied

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[3] For additional authority on the proper procedures for post-verdict relief, we refer the Defendant to *Commonwealth v. Davenport*, 307 Pa. Super. 102, 452 A.2d 1058 (1982); *Commonwealth v. Banks*, 45 Bucks Co. L. Rep. 12, 16 (1984) (citing *Goldblum*, supra, *Davenport*, supra, and *Gravely*, supra, the Court held that a brief which specifically raises and argues issues *generally* alleged in the post-trial motion is no longer a substitute for specific post-verdict motions; nor can post-verdict motions insufficient because of their lack of specificity be made sufficient by a brief which amplifies and defines those motions.

[4] 35 Pa. 1271 defines "fireworks" in pertinent part, as:

> . . . any combustible or explosive combination or any substance or combination of substances, or except as hereinafter provided, any article prepared for the purpose of producing a visible or an audible effect by combustion, explosion, deflagration or detonation . . . .

1939, May 15, P.L. 134, §1, as amended 1959, June 24, P.L. 486, §1; 1973, Nov. 9, P.L. 335, No. 112, 35 Pa. C.S.A. 1271.

on the basis of a review of the evidence and the instructions, that the instructions of the Court more than adequately defined the law applicable to the evidence. While the Court in *Bristow* acknowledged that "detonation" is a distinguishing characteristic of an explosion, it by no means limited the chemical reaction contemplated by the statute to a detonation. Nor did the Court comment on the degree of loudness or bursting except to state that the expansion of the air and the report which it produces greatly varies in its degrees of violence and the effects produced - facts fully within the knowledge of all. *Bristow*, supra, at 455, 301 A.2d at 159-160. The testimony and the demonstration established that these fireworks fall within the statutory prohibitions of §§1271 and 1272, and the instructions clearly and accurately reflect this.

With regard to the remainder of the argument presented in the Defendant's brief, we are unable to determine either the reasoning the Defendant is attempting to advance or the relevance to the error assigned in the post-verdict motion. Having properly disposed of what we determine the first assignment of error to be, we decline to become Defendant's counsel. When issues are not properly raised and developed in briefs or the briefs are wholly inadequate to present specific issues for review, a court will not consider the merits thereof. *Commonwealth v. Sanford*, 299 Pa. Super. 64, 67, 445 A.2d 149, 150 (1982); *Commonwealth v. Bossick*, 305 Pa. Super. 196, 204, 451 A.2d 489, 493 (1982).

The second assignment of error similarly relates to the Court's instructions. Once again, we are satisfied that the instructions clearly and accurately reflected the law applicable to the evidence and the issues presented. The phrase "except as hereinafter provided . . ." in paragraph 1 of

§1271 merely serves to qualify the definition of fireworks and the list of prohibited devices.

The drafters apparently recognized that some fireworks were of such a nature that their proscription was not necessary. Paragraph 2 of §1271 represents those "hereinafter provided", that is, those which the legislature determined do not jeopardize the health, safety and general welfare of the public. As we stated previously, the evidence established that the fireworks in question clearly fall within the definitional framework of §1271.

We do not agree that §1272 allows state policemen to arbitrarily decide whether a firework is illegal. These particular fireworks clearly fall within the definition of illegal fireworks under §1271 and the statutory prohibition of §1272. In addition, whether other persons or businesses offer for sale or display openly the very same fireworks is not a concern which we were required to address at trial, nor are we required to consider it now. With regard to any other arguments offered in support of the second assignment of error, we dismiss them as not having been properly raised in the Defendant's post-trial motion. *Commonwealth v. Goldblum*, 498 Pa. 455, 467, 447 A.2d 234, 240 (1982).[5]

Defendant's next assignment of error contests the jurisdiction of the Luzerne County Court. In his post-verdict motion, the Defendant claims that the Commonwealth never proved that he sold any fireworks, legal or illegal at any time or place in Luzerne County; however, the brief

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[5] Even if we were to consider the other arguments set forth in the brief under the second assignment of error, we would be forced to conclude that the arguments lack the clarity necessary for our review. *Commonwealth v. Sanford*, 299 Pa. Super. 64, 445 A.2d 149 (1982); *Commonwealth v. Bossick*, 305 Pa.Super. 196, 451 A.2d 489, 493 (1982).

argues the Commonwealth's failure to prove that the Defendant *personally* ever offered for sale, exposed for sale or sold at retail any fireworks and that this in itself precludes jurisdiction.

Despite the Defendant's failure to phrase it as such, we read the third assignment of error as a challenge to the sufficiency of the evidence. The law requires us to consider the entire trial record, including evidence actually received whether or not the Court's rulings thereon were correct. *Commonwealth v. Scarborough*, 313 Pa. Super. 521, 525-526, 460 A.2d 310, 312 (1983). We must accept as true all the evidence upon which the jury could properly have reached its verdict. Furthermore, as verdict winner, we must give the Commonwealth the benefit of all reasonable inferences arising from the evidence and determine whether the evidence and inferences therefrom are sufficient in law to prove beyond a reasonable doubt that the Defendant is guilty of the crime or crimes of which he has been convicted. *Commonwealth v. Williams*, 468 Pa. 357, 365, 362 A.2d 244, 248 (1976); *Commonwealth v. Madison*, 263 Pa. Super. 206, 209-210, 397 A.2d 818, 820-821 (1979).

We do not hesitate to find the evidence sufficient to establish that the Defendant offered for sale, exposed for sale or sold illegal fireworks in Luzerne County on April 29, 1983 (Information # 461), May 9, 1983 (Information # 461-A), May 23, 1983 (Information # 461-B), May 27, 1983 (Information # 461-C) and June 9, 1983 (Information # 461-D).[6]

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[6] We note here that while the Defendant argues that the Commonwealth failed to prove that he *offered for sale, exposed for sale,* or *sold* illegal fireworks, the Informations only charged the Defendant with offering for sale and/or exposing for sale a quantity of fireworks.

The law is clear that " 'the locus of a crime is always in issue, for the court has no jurisdiction of the offense unless it occurred within the county of trial . . . .' " *Commonwealth v. Ohle,* 291 Pa. Super. 110, 128, 435 A.2d 592, 601, (1981) (remanded on other grounds, 503 Pa. 566, 470 A.2d 61 (1983)). Jurisdiction is ordinarily a question of law, one which should be decided by the Trial Judge. However, where jurisdiction depends on the resolution of disputed facts, the jury may properly resolve the questions which arise. *Ohle,* supra, at 128, 435 A.2d at 601.

Mr. Rubin testified that within the last several years, he would telephone Theta-Thier Industries to place an order and the fireworks would be delivered to his business on East Northampton Street in Wilkes-Barre, Luzerne County. The jury determined that the Defendant offered for sale and/or exposed for sale illegal fireworks in Luzerne County. We find the evidence and inferences therefrom sufficient in law to prove beyond a reasonable doubt that the Defendant violated §1272 in Luzerne County.

In support of the last assignment of error, the Defendant cites to us a 1972 United States Supreme Court case. In *Argersinger v. Hamlin,* 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972), a case dealing with an indigent's right to counsel for a crime which carried with it the possibility of imprisonment of up to six months, a $1,000.00 fine, or both, the Court held: ". . . [a]bsent a *knowing and intelligent waiver,* no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial". (Footnotes omitted) (Emphasis added).[7]

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[7] We note here that the quoted material in the Defendant's brief from the *Argersinger* case, is from the concurring opinion of Justice Powell. Justice Douglas delivered the opinion of the Court.

We are certainly bound by Supreme Court precedents, however, we do not read the instant case as one falling within the focus of the *Argersinger* decision. For two reasons, we find the Defendant's reliance on this case misplaced.

First, the *Argersinger* case dealt with indigents, i.e., people unable to afford private counsel to represent their interests. The Defendant does not purport to be, nor do we find him to be an indigent. In fact, the Defendant admitted his ability to afford an attorney, yet he maintained his desire to proceed without one.

Second, we are of the opinion now, as we were at the time of the trial, that the Defendant made a "knowing and intelligent waiver" of his right to have counsel. Pa. R. Crim. P. 318(c) provides:

> PROCEEDINGS BEFORE A JUDGE: When the defendant seeks to waive the right to counsel after the preliminary hearing, the judge shall ascertain from the defendant, on the record, whether this is a knowing, voluntary and intelligent waiver of counsel.

In determining whether a Defendant understands the full impact of his waiver, the Comments to Rule 318 guide the Trial Judge's colloquy. For example, questions should seek to elicit the following information: (1) whether the Defendant understands the nature of the charges against him and the elements of those charges; (2) whether the Defendant is aware of the permissible range of sentences and/or fines; (3) whether the Defendant understands that if he waives the right to counsel *he will still be bound by all the normal rules of procedure* (emphasis added); (4) whether the Defendant understands there are possible defenses which counsel might be aware of and which may be lost if not raised at trial; (5) whether the Defendant understands that

he has many rights which, if not timely asserted, may be lost permanently, and that any errors must be objected to or else lost permanently. Additionally, we find guidance in *Commonwealth v. Davis*, 479 Pa. 274, 276-277, 388 A.2d 324, 325 (1978), where the same issue was raised and considered by the Pennsylvania Supreme Court. Chief Justice Eagen, writing for the Court, held that a defendant in a state criminal trial has a constitutional right to represent himself if he voluntarily and intelligently elects to do so.[8] See also: *Commonwealth v. Cathey*, 477 Pa. 446, 384 A.2d 589, 590 (1978).

Based on the authority of Pa. R. Crim. P. 318 and *Commonwealth v. Davis*, supra, together with our review of the record, we are satisfied that the Court's inquiry properly and adequately informed the Defendant of his rights with regard to counsel. Furthermore, we are satisfied that the Defendant made a knowing, voluntary and intelligent waiver of this right. Not only did the Court conduct an extensive inquiry at the pre-trial stage of the case, the Court repeatedly recommended throughout the trial as well as at post trial, that the Defendant secure counsel to protect his rights. The Defendant continually declined to adhere to these recommendations, noting his dissatisfaction with attorneys in the past and his belief that he could better handle his case.

Accordingly, we enter the following:

END OF OPINION.

ORDER IS ATTACHED SEPARATELY AS PAGE NO. 11.

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[8] In reaching its conclusion, the Court relied on *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1976). We refer the defendant to the *Davis* case not only because it states the applicable law on this issue, but because the opinion contains an example of the circumstances under which the issue arises and a sample colloquy between the Trial Judge and the Defendant which the Pa. Supreme Court approved as an appropriate and satisfactory inquiry regarding a Defendant's waiver of his right to counsel.

Appendix B

APPENDIX B

J.20017/86

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
LEONARD THIER, Appellant	:	No. 00885 Philadelphia 1985

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of LUZERNE County be, and the same is hereby AFFIRMED.

BY THE COURT:
s/ J. Haniel Henry
PROTHONOTARY

Dated: June 16, 1986

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
LEONARD THIER, Appellant	:	No. 00885 Philadelphia 1985

Appeal from Order entered February 28, 1985, in the Court of Common Pleas of Luzerne County, Criminal No. 461, 461A, B, C, D of 1984.

BEFORE: McEWEN, OLSZEWSKI, and KELLY, JJ.

Appendix B

FILED Jun 16 1986

OPINION BY OLSZEWSKI, J.:

This appeal is from the judgment of sentence entered by the Court of Common Pleas of Luzerne County following appellant's conviction of five (5) violations of 35 Pa. Cons. Stat. Ann. Sec. 1272 regarding the illegal sale of fireworks. Post-trial motions were denied, and appellant was sentenced to serve a minimum of sixty (60) days in prison and fined $500. Appellant has defended himself both at trial and on appeal.

Appellant raises ten (10) issues for our consideration. Initially he contends: (1) that appellant had standing to contest the admission of certain invoices; (2) that appellant's Fifth Amendment rights were violated when he was denied a grand jury indictment; (3) that appellant was denied the right to a speedy trial and to be confronted with the witnesses against him; (4) that the trial judge led the appellant's witness into hearsay and highly speculative testimony and led the witness into making other erroneous and unfair statements; (5) that the trial judge erred in prohibiting the introduction of appellant's insurance policies; and (6) that the statute in question was unconstitutionally applied to the appellant. We do not reach these issues, as we find that they have been waived. An issue is not properly preserved for appellate review if it is not raised in written post-verdict motions as required by Pa. R. Crim. P. 1123(a). *Commonwealth v. Gravely,* 486 Pa. 194, 404 A.2d 1296 (1979); *Commonwealth v. Blair,* 460 Pa. 31, 331 A.2d 213 (1975). Appellant was made aware of the requirement by the trial judge. *See* trial transcript, p. 249. Since appellant has failed to raise these issues in post-trial motions, they are not preserved for our review.

Appendix B

Appellant's seventh and eighth issues are related as they both refer to an alleged improper charge to the jury. Appellant argues that the trial judge erred in failing to advise the jury of the case of *Commonwealth v. Bristow*, 185 Pa.Super. 448, 138 A.2d 156 (1957), which states that to be illegal in Pennsylvania, a fireworks device must detonate, that is, explode with noise; and that the omission of such a charge deprived appellant of a fair trial. Further, appellant claims that the trial judge erred by not advising the jury that the words "such fireworks as are not herein prohibited" are a part of the fireworks act, meaning that all fireworks are not illegal, and this failure precluded appellant's right to a fair trial. We find both of appellant's claims to be baseless. A careful reading of the trial judge's charge shows that both of the "omitted charges" were in fact included in the trial judge's instructions to the jury. *See* trial transcript, pp. 236-243. Therefore, issues seven and eight lack merit.

Appellant's ninth point of error is that the prosecution never proved that appellant sold fireworks in Luzerne County, thus precluding jurisdiction in the matter. It is clear that a court has no jurisdiction unless the crime was committed within the county where the defendant is tried; and that the locus of a crime is a question of fact. *See Commonwealth ex rel. Ritchey v. McHugh*, 189 Pa.Super. 515, 151 A.2d 659 (1959). It is equally clear that the facts of the case at bar indicate that upon receiving an order by telephone, appellant would deliver illegal fireworks to a Mr. Rubin in Wilkes-Barre, Luzerne County. The jury thus determined that appellant offered for sale and/or exposed for sale illegal fireworks in Luzerne County. Therefore, by the evidence found by the jury, appellant violated the law—35 Pa. Cons.Stat.Ann.sec. 1272—in Luzerne County. Jurisdiction was properly established in the trial court.

Appendix B

Appellant's final argument is that his rights under *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972), have been violated, and thus he was deprived of a fair trial. In *Argersinger v. Hamlin*, the Supreme Court stated ". . . absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." *Id*. We find that appellant's rights were not violated under this rule as appellant has made a knowing and intelligent waiver of his right to counsel.

In determining whether appellant has adequately waived his right to counsel, we must determine whether the trial judge elicited appellant's awareness of a number of facts. *See Commonwelth v. Roman*, Pa.Super. , 500 A.2d 1182 (1985); Pa.R.Crim.P. 318(c) comments. Appellant must understand that he has the right to be represented by counsel, and the right to free counsel if he is indigent. This right was explained to appellant by the trial judge, and appellant expressed his understanding. *See* trial transcript, pp. 3-5. Appellant was also aware of the nature of the charges against him and the permissible range of sentences and fines for the offense. *See* trial transcript, pp. 6-8. Further, the trial judge explained that appellant would be bound by the rules of procedure if he represented himself, and that counsel would be familiar with those rules. *See* trial transcript, pp. 8-10. Finally, appellant was made aware that there are defenses that counsel would know of that could be lost permanently if not raised at trial, and that there are certain rights and errors that would be lost permanently if not timely asserted. *See* trial transcript, pp. 10-12; sentencing transcript, p. 22. Since appellant was fully aware of the consequences of his self-

representation, we find that appellant voluntarily and intelligently elected to represent himself at trial and on appeal, and that he had the right to do so. *See Commonwealth v. Davis*, 479 Pa. 274, 388 A.2d 324 (1978). Therefore, appellant waived his right to counsel and cannot raise the absence of counsel as a point of error on appeal.

Having found no merit in appellant's ten points of error, we affirm the decision of the lower court. Order affirmed.

Appendix C

APPENDIX C

REC'D.
APR 27 1987
District Attorney's Office

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

Marlene F. Lachman, Esq.
Prothonotary
Patrick Tassos
Deputy Prothonotary

468 City Hall
Philadelphia, PA 19107
(215) 496-4600

April 24, 1987

Leonard Thier
327 Wheeler Avenue
Scranton, Pennsylvania 18510

RE: Commonwealth v. Leonard Thier, Petitioner
No. 801 E. D. Allocatur Docket 1986

Dear Mr. Thier:

This is to advise you that the following Order has been endorsed on your Petition for Allowance of Appeal, filed in the above captioned matter:

"April 21, 1987.
Petition denied.
Per Curiam."

Very truly yours,
s/ PATRICK TASSOS
Deputy Prothonotary

/aw
cc: Joseph C. Giebus, Esq.

Appendix D

APPENDIX D

Q Are you generally familiar with combustible and explosive items such as fireworks?

A Yes, sir. My training includes that.

Q Are you also familiar with the Fireworks and Explosives Act of the Commonwealth of Pennsylvania?

A Yes, sir.

Q Are you specifically familiar with the definition of fireworks as located in Section 1272 of the Fireworks and Explosive Act of the Commonwealth of Pennsylvania?

A Yes, I am familiar with the definition.

MR. PODCASY: Your Honor, at this time I would like to move for the qualification of Trooper Powell as an expert in the area of fireworks and explosives.

THE COURT: Mr. Thier, you have the right, if you care to exercise it, to cross-examine the officer on his qualifications to testify as an expert.

VOIR DIRE EXAMINATION BY THE DEFENDANT:

Q Trooper, are you aware of the difference between the D.O.T. Class B and Class A and Class C fireworks?

A Yes.

Q What is the difference? Well, specifically between Class B and Class C?

A It deals with the amount of explosive material in the compound.

Q Okay. How much is allowable under Class C?

A I would have to research that. Off the top of my head, I don't have the exact figures.

Q Do you know how much is allowable for Class B?

A I would also have to research that amount in a textbook.

MR. PODCASY: Your Honor, I'm going to object to this line of questioning in that there is no distinction in the Fireworks and Explosive Act as to the classifications of fireworks.

THE COURT: I would agree with the Commonwealth's statement, but I'll permit it as to cross-examination as to his qualification.

THE DEFENDANT: Your Honor, I have no problem with the qualifications of this officer as being very familiar with flammable materials. But fireworks are relatively a minor part of the on-going things of -- in this State. And the Trooper has just admitted that he cannot -- that he cannot differentiate between Class B and Class C fireworks. I mean, he knows there is a difference.

THE COURT: Again, Mr. Thier, so there is no misunderstanding, the Legislature of the Commonwealth of Pennsylvania and the Firework Act in question in this case has not distinguished in any way between Class A, B or C. They are either legal or illegal and there is no such classification.

THE DEFENDANT: Okay. I'll drop --

THE COURT: You're dealing with classifications for purposes of transportation, which is completely different. It has nothing to do with this case.

THE DEFENDANT: I'll drop that line of questioning, Your Honor.

BY THE DEFENDANT:

Q Trooper -- and I don't mean to challenge your qualifications, but I just have to know for my own information, do you know, can you give me a ready definition of combustion?

A Combustion is the burning process and

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half from the Government, half administrative, attend this summer's seminar. And I participated in a second course taught at the Franklin Institute in Philadelphia dealing with explosives and solid state chemistry.

I'm a consultant for currently United States Army on several pyrotechnic contracts. I've been a consultant in the past for Federal Aviation Administration and United States Secret Service and a number of companies in the explosives and pyrotechnics field. I've testified, I would estimate, a dozen times in Court as an expert witness in the field of explosives and pyrotechnics.

THE COURT: Do you care to cross-examine the Doctor on his qualifications?

MR. PODCASY: No, sir.

THE COURT: I'll permit the Doctor to testify as an expert.

THE DEFENDANT: Thank you, Your Honor.

THE COURT: You may now ask him questions.

BY THE DEFENDANT:

Q Doctor Conkling, could you tell us the difference between Class C and Class B fireworks?

MR. PODCASY: Objection, Your Honor.

THE COURT: Sustained. Again, the reason is that in Pennsylvania we do not as far as our statute is concerned distinguish in any way by class. Fireworks are defined and I suggest that we limit our examinations to the statute in question.

BY THE DEFENDANT:

Q Doctor Conkling, are you familiar with the four items, the air travels, toy tanks, artificial satellite and ground bloom flower?

A Yes, I am.

Q Thank you. The major question I'm going to ask you about these items is, do any of these items detonate?

A No, they do not.

Q Could you tell us basically what they do? Can you tell us what the air travel does?

A The air travel is a device that when the fuse is ignited a column of a composition similar to black powder which is made right here in Moosic, Pennsylvania, but this is a Chinese item. It's a mixture of potassium nitrate, sulfur and charcoal,

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Appendix E

APPENDIX E

Commonwealth of Pennsylvania	:	In the Court of Common Pleas Of the 11th Judicial District
vs.	:	Luzerne County Branch Criminal Division
Leonard Thier	:	Nos. 461, 461 A, B. C. & D, 1984

MOTION IN ARREST OF JUDGMENT

And now, this 26th day of September 1984, Leonard Thier, the above named defendant, against whom a verdict of guilty was entered in the above-captioned matter on the 19th day of September 1984, moves the court to arrest the judgment against him for the following reasons:

1. The Pennsylvania Fireworks Law, the Act of May 15, 1939, P.L. 134, as amended, has been unconstitutionally applied to me in this particular trial.

2. "The Fireworks Law" is comprehensive in its terms and has been interpreted by the Pennsylvania Superior Court in Commonwealth vs. Bristow, 185 PA Super. 448, yet the Learned Trial Judge failed to invoke the Superior Court's observations in his charge to the jury thus violating my right to a fair trial.

Respectfully submitted,

s/ Leonard Thier, Pro Se

Appendix E

Commonwealth of Pennsylvania	:	In the Court of Common Pleas Of the 11th Judicial District
vs.	:	Luzerne County Branch Criminal Division
Leonard Thier	:	Nos. 461, 461 A, B. C. & D, 1984

MOTION FOR A NEW TRIAL

And now this 26th day of September, 1984, Leonard Thier moves the court for a new trial in the above-captioned matter for the following reasons:

1. The Learned Trial Judge, in his instructions to the jury, made an error in not advising the jury of the adjudication handed down by the Pennsylvania Superior Court in Commonwealth vs. Bristow, 185 PA Super. 448, to the effect that to be illegal in Pennsylvania, a fireworks device must detonate, that is explode with noise, and that omission precluded my right to a fair trial.

2. The Learned Judge, in his instructions to the jury, omitted telling the jury that the words 'such fireworks as are not herein prohibited' are indeed contained in the fireworks act (Section 4, paragraph 1). This phrase clearly establishes that the legislature in its wisdom did not intend to outlaw all fireworks and failure of the Learned Judge to instruct the jury on this precluded my right to a fair trial.

3. The prosecution never proved that I have sold any fireworks, legal or illegal, at any time or place, particularly in Luzerne County, thus precluding jurisdiction in this matter.

Appendix E

4. My rights under Arborsanger vs. Hamlin, Sheriff, U.S. Supreme Court, 407 U.S. 25, June 12, 1972, have been violated by statements and attitudes expressed by Learned Judge thus precluding my right to a fair trial.

I reserve the right to file additional and supplemental reasons for new trial when the notes of testimony taken at the trial have been transcribed, and a copy thereof made available to me.

Respectfully submitted,
s/ Leonard Thier, Pro Se

APPENDIX F

§1507.1

PART 1507—FIREWORKS DEVICES

§1507.1 Scope.

This Part 1507 prescribes requirements for those fireworks devices (other than firecrackers) not otherwise banned under the act. Any fireworks device (other than firecrackers) which fails to conform to applicable requirements is a banned hazardous substance and is prohibited from the channels of interstate commerce. Any fireworks device not otherwise banned under the act shall not be a banned hazardous substance by virtue of the fact that there are no applicable requirements prescribed herein.

§1507.2 Prohibited chemicals.

Fireworks devices shall not contain any of the following chemicals:

(a) Arsenic sulfide, arsenates, or arsenites.

(b) Boron.

(c) Chlorates, except:

(1) In colored smoke mixtures in which an equal or greater amount of sodium bicarbonate is included.

(2) In caps and party poppers.

(3) In those small items (such as ground spinners) wherein the total powder content does not exceed 4 grams of which not greater than 15 percent (or 600 milligrams) is potassium, sodium, or barium chlorate.

(d) Gallates or gallic acid.

(e) Magnesium (magnesium/aluminum alloys, called magnalium, are permitted).

(f) Mercury salts.

(g) Phosphorus (red or white). Except that red phosphorus is permissible in caps and party poppers.

(h) Picrates or picric acid.

(i) Thiocyanates.

(j) Titanium, except in particle size greater than 100-mesh.

(k) Zirconium.

§1507.3 Fuses.

(a) Fireworks devices that require a fuse shall:

(1) Utilize only a fuse that has been treated or coated in such manner as to reduce the possibility of side ignition. Devices such as ground spinners that require a restricted orifice for proper thrust and contain less than 6 grams of pyrotechnic composition are exempted from §1507.3(a)(1).

(2) Utilize only a fuse which will burn at least 3 seconds but not more than 6 seconds before ignition of the device.

(b) The fuse shall be securely attached so that it will support either the weight of the fireworks device plus 8 ounces of dead weight or double the weight of the device, whether is less, without separation from the fireworks device.

Appendix F

§1507.4 Bases.

The base or bottom of fireworks devices that are operated in a standing upright position shall have the minimum horizontal dimensions or the diameter of the base equal to at least one-third of the height of the device including any base or cap affixed thereto.

§1507.5 Pyrotechnic leakage.

The pyrotechnic chamber in fireworks devices shall be sealed in a manner that prevents leakage of the pyrotechnic composition during shipping, handling, and normal operation.

§1507.6 Burnout and blowout.

The pyrotechnic chamber in fireworks devices shall be constructed in a manner to allow functioning in a normal manner without burnout or blowout.

§1507.7 Handles and spikes.

(a) Fireworks devices which are intended to be hand-held and are so labeled shall incorporate a handle at least 4 inches in length (see §1500.14(b)(7)). Handles shall remain firmly attached during transportation, handling and full operation of the device, or shall consist of an integral section of the device at least four inches below the pyrotechnic chamber.

(b) Spikes provided with fireworks devices shall protrude at least 2 inches from the base of the device and shall have a blunt tip not less than 1/8-inch in diameter of 1/8-inch square.

§1507.8 Wheel devices.

Drivers in fireworks devices commonly known as "wheels" shall be securely attached to the device so that

they will not come loose in transportation, handling, and normal operation. Wheel devices intended to operate in a fixed location shall be designed in such a manner that the axle remains attached to the device during normal operation.

§1507.9 Toy smoke devices and flitter devices.

(a) Toy smoke devices shall be so constructed that they will neither burst nor produce external flame (excluding the fuse and firstfire upon ignition) during normal operation.

(b) Toy smoke devices and flitter devices shall not be of such color and configuration so as to be confused with banned fireworks such as M-80 salutes, silver salutes, or cherry bombs.

(c) Toy smoke devices shall not incorporate plastic as an exterior material if the pyrotechnic composition comes in direct contact with the plastic.

§1507.10 Rockets with sticks.

Rockets with sticks (including sky-rockets and bottle rockets) shall utilize a straight and rigid stick to provide a direct and stable flight. Such sticks shall remain straight and rigid and attached to the driver so as to prevent the stick from being damaged or detached during transportation, handling, and normal operation.

§1507.11 Party poppers.

Party poppers (also known by other names such as "Champagne Party Poppers," and "Party Surprise Poppers,") shall not contain more than 0.25 grains of pyrotechnic composition. Such devices may contain soft paper or cloth inserts provided any such inserts do not ignite during normal operation.